

**BEFORE THE DEPARTMENT OF WATER RESOURCES  
OF THE STATE OF IDAHO**

|  |   |                    |
|--|---|--------------------|
| IN THE MATTER OF APPLICATION                 | ) |                    |
| FOR TRANSFER NO. 71692 (WATER RIGHT          | ) | <b>FINAL ORDER</b> |
| NOS. 45-2472, 45-10069, and 45-2399), IN THE | ) |                    |
| NAME OF DAVID L. & SHIRLENE FUNK             | ) |                    |
| _____  | ) |                    |

**PROCEDURAL BACKGROUND**

**Prehearing Processes**

On May 26, 2005, David L. and Shirlene Funk (“Funks”) filed application for transfer no. 71692 with the Idaho Department of Water Resources (“the Department”), seeking to add a point of diversion and change the nature of use and season of use for three ground water rights. The application for transfer seeks a change in nature of use from irrigation to commercial and stockwater purposes for a dairy. Notice of the application for transfer was published. Marjorie Bradshaw, Thomas C. Draper, John Kloer, Kenneth Skow, Farnum and Irene Warr, and Kenneth N. Warr protested the application.

On January 24, 2006, the Department conducted a hearing for the protests. Funks appeared by and through their attorney, Rob Williams. Kenneth Warr, Thomas C. Draper, and Kenneth Scow appeared representing themselves. Marjorie Bradshaw, John Kloer, and Farnum and Irene Warr did not appear at the hearing.

**Hearing Processes and Ruling on Evidence Offered**

At the hearing, protestant Kenneth Warr offered 38 exhibits into the record. The applicant objected to the admission of a number of the documents. Kenneth Warr subsequently withdrew a few of the offered exhibits. Funks stipulated to the admission of some of the documents as exhibits.

Because almost none of the offered documents were supported by foundational evidence, the hearing officer did not commit to receiving any of Kenneth Warr’s offered exhibits into evidence. The hearing officer stated that he would review the documents sought for admission to determine the relevance of the information and the foundation for the admission of the documents as evidence. The hearing officer stated he would rule on the admissibility of the documents in the preliminary order.

The hearing officer reviewed the documents offered as exhibits by Kenneth Warr and received the following into evidence:

| Protestant Exhibit | Description   | Reason for Admission  |
|--------------------|---|---|
| B                  | Nitrates in Ground Water a Continuing Issue for Idaho Citizens  | Information about nitrates and harmful concentrations                       |
| C                  | Ground Water Quality in the Twin Falls Hydrogeologic Subarea 1991 – 2000  | Shows area as having various pollutants                                     |
| F                  | Seepage from a Newly Constructed Dairy Lagoon, September 14-16, 1994, Utah State University   | The author testified at the hearing about this test                         |
| O                  | Idaho State Department of Agriculture List of Dairies in Idaho - Waste inspection – Animal Summary 1 May 2003                         | Shows David Funk as a dairy producer in the state                           |
| P                  | Idaho State Department of Agriculture Nitrate List from 08/01/199-08/02/2002  | Contains nitrate concentration information for David Funk Dairy wells       |
| Q                  | Idaho State Department of Agriculture Nitrate List from 08/01/2002  | Contains nitrate concentration information for David Funk Dairy wells       |
| T                  | Idaho State Department of Agriculture Resources Division. Monitoring Ground Water Nitrate Concentrations with Sampling Data           | Discusses nitrate levels in Cassia and Twin Falls Co.                       |
| U                  | Nitrogen (N) Isotope Values Ratio – Possible Nitrogen Sources   | Establishes ground water nitrogen as having come from human or animal waste |
| W                  | Map of Cassia County Denoting Dairies & Feedlots in West Cassia County – (West of Burley)   | Shows locations of confined Animal Feeding Operations (CAFO's)              |
| X                  | Map with Stars Denoting Residences  | Shows location of residences near proposed David Funk Dairy                 |
| Z                  | Idaho State Department of Agriculture MOU Annual Report 20 April 2005   | Discusses challenges of monitoring water quality                            |
| AB                 | Critical Ground Water and Water Management Areas in Idaho January 1992 - Cottonwood, Oakley Kenyon, Artesian City and West Oakley Fan | General information about nearby ground water problems                      |
| AC                 | Map Showing Critical Ground Water Areas in West Cassia County   | General information about nearby ground water problems                      |
| AE                 | Permitted Animal Units in Cassia County   | Documents Cassia Co. approval of David Funk CAFO                            |
| AF                 | Funk Dairy, Cassia County, CAFO Siting Suitability Determination  | State team rates the proposed David Funk Dairy site                         |
| AG                 | Nitrate Overview Statewide. Ambient ground water quality monitoring program, 1990 – 2003  | Establishes proposed Funk Dairy located in area of water quality concern    |

The hearing officer determined the following documents would not be received into evidence and would not be considered by the hearing officer in this decision:

| Protestant Exhibit | Description  | Reason not Admitted   |
|--------------------|--|---|
| A                  | Probability of Detecting Elevated Concentrations of Nitrate in Ground Water in a Six County Area in South Central Idaho  | General document about statewide probabilities – not specific enough and as a result, not relevant                |
| L                  | Analysis of Nitrate (NO <sub>3</sub> -N) Concentration Trends in 25 Ground Water Quality Management Areas, Idaho 1961 -2001  | Technical information is too broad to help in analyzing the impact of the David Funk Dairy proposal               |
| R                  | Idaho State Department of Agriculture Nitrate Report 04/25/2002  | Does not contain information about the David Funk Dairy   |
| V                  | Appendix D – Aquifer Configuration<br>Appendix E – Sample Maps & Data  | General hydrogeologic information not needed  |
| AA                 | Idaho State Department of Agriculture Letter of July 29, 2005 with Attached Dairy Resource Exportation Summary. Idaho State Department of Agriculture Soil Testing Waste Inspection – Mature Animal Summary. Nitrate Management Summary 2003 | Very large document with no apparent information related to the David Funk Dairy                                  |
| AD                 | Map Showing Ground Water Flows   | Not relevant  |
| AH                 | Idaho County Data  | Not relevant  |
| AI                 | Watershed Protection Plan for Scott's Pond Watershed in Jerome Co, Idaho   | Specific plan for another area - not the area where David Funk Dairy is proposed                                  |
| AJ                 | Letter from Bob Ohlensehlen to Gerald Martens  | Insufficient foundation - Does not establish time, place, and relationship to David Funk Dairy                    |
| AK                 | Map of area around the proposed David Funk Dairy   | Insufficient foundation - Does not identify or explain significance of markings and concentric circles on the map |

In addition, after reviewing the exhibits submitted by Funks, the hearing officer did not receive three of Funks' exhibits into evidence that were previously received into evidence. Applicant's Exhibit no. 4 is a re-creation of the Department's transfer file. The hearing officer will consider the documents in the original file and discard Applicant's Exhibit no. 4.

Applicant's Exhibit no. 8 is purported to be a determination of net water savings resulting from the transfer. The extensive computations are based on an assumption that Funks historically grew alfalfa on the acreage being retired. Funks' expert assumed a

consumptive use of 2.82 acre-feet per acre for alfalfa. The 55.8 acres proposed to be retired were determined based on a mixed crop consumptive use rate of 2.47 acre-feet per acre. The difference between 2.82 and 2.47 is 0.35 acre-feet per acre. The product of multiplying 0.35 acre-feet/acre by 55.8 acres is 19.53 acre-feet. The purported savings computed in Applicant's Exhibit no. 8 is 19.6 acre-feet. There is no real savings computed in Applicant's Exhibit no. 8. As a result, the hearing officer refused admission of Applicant's Exhibit no. 8.

Applicant's Exhibit no. 10 is not relevant to the factors that must be considered by the Department, and the hearing officer refused to receive Applicant's Exhibit no. 10 into evidence.

### **Post Hearing Processes**

On May 10, 2006, the hearing officer issued a notice of default order to Marjorie Bradshaw, John Kloer, and Farnum and Irene Warr stating that their protests would be dismissed for failure to attend the hearing. The non-attending protestants did not contest the issuance of a default order.

On May 22, 2006, the hearing officer issued a *Preliminary Order and Default Order*, approving application for transfer no. 71692 and dismissing Marjorie Bradshaw, John Kloer, and Farnum and Irene Warr as parties.

On June 5, 2006, Protestants Kenneth Warr, Thomas C. Draper, and Kenneth Skow petitioned the hearing officer to reconsider the preliminary order approving application for transfer no. 71692. On June 20, 2006, the hearing officer denied the protestants'/petitioners' petition for reconsideration.

On July 5, 2006, Protestants Kenneth Warr, Thomas C. Draper, and Kenneth Skow filed *Protestants Exception to Recommended Order and Denial of Petition for Reconsideration* ("the exceptions"). The parties who filed the exceptions will hereafter be referred to as "the protestants."

Karl Dreher ("Dreher"), the former Director of the Department, reviewed the exceptions, the record, and particularly compared the testimony of Robert Ohlensehlen to the nutrient management plan for the dairy proposed by Funk, dated December 30, 2004, that was received into evidence at the hearing. Dreher found significant inconsistencies between the testimony of Funks' witnesses presented at the hearing and the December 30, 2004 nutrient management plan. Dreher also identified other problems with the December 30, 2004, nutrient management plan.

On November 6, 2006, Dreher sent a letter to Patrick Takasugi (Takasugi), the former Director of the Idaho Department of Agriculture. Dreher's letter identified four concerns:

- All 32 fields identified as waste disposal fields were assigned a phosphorus runoff risk rating of "Very High."

- The proposed dairy would be located in a Priority 1 Area of Nitrogen Concern. 24 of the 32 fields identified as waste disposal fields were assigned an overall nutrient leaching risk rating of “Very High” or “High.”
- Witnesses at the hearing testified that waste containing nutrients would be applied at a rate that equals the crop uptake. Computations in the December 30, 2004 nutrient management plan, comparing nutrient application and crop uptake, proposed application of nutrients in excess of the crop uptake.
- The December 30, 2004 nutrient management plan determined that 20,852 tons of manure would be transported off-site annually, but did not evaluate the rates at which the manure would be applied to insure application at agronomic rates.

On November 22, 2006, the Department received a letter from Takasugi responding to Dreher’s letter. Takasugi attached to the letter a more recent nutrient management plan for the dairy proposed by Funks, dated June 30, 2006. Takasugi also attached to his letter a copy of a July 17, 2006 letter written to David Funk by Hilary Simpson, an employee of the Idaho Department of Agriculture. The July 17, 2006 letter written by Hilary Simpson stated that the June 30, 2006 nutrient management plan was approved. The June 30, 2006 nutrient management plan modified information contained in the December 30, 2004 nutrient management plan. Some of the changes included:

- Increased the number of fields identified for waste application from 32 to 50 or 51. Decreased the number of fields that receive a high or very high leaching risk assessment from 24 to 21.
- Increased the amount of exported waste from 20,852 tons of manure to 44,403 tons of manure (taken from page 100 of the 2006 NMP in the column labeled “Amount”).
- In the annual nutrient balance, did not allow nutrients to exceed crop uptake.

Takasugi addressed Dreher’s concerns about the December 30, 2004 nutrient management plan as follows:

- The phosphorus runoff risk ratings of “Very High” for the waste application fields were derived in Appendix B of the “One Plan Conservation Planner,” titled Nutrient Risk Analysis,” that is set up for “Phosphorus Indexing.” The state of Idaho has not adopted phosphorus indexing as a standard, and nutrient management planners are not required to fill in the data fields for the phosphorus indexing. As a result, the phosphorus runoff risk rating will default to “Very High” without actually analyzing the risk
- The concern that 24 of the 32 fields identified as waste disposal fields (now 21 of 50) were assigned an overall nutrient leaching risk rating of “Very High” or “High” **was not addressed by the Takasugi letter**, unless these ratings are also incorrect because they are part of the broader “Nutrient Risk Analysis” portion of the “One Plan Conservation Planner” and data fields for entry of data about nitrogen nutrient leaching may also have been left blank. With respect to

nitrogen, the Takasugi letter only stated that “there must be supplemental applications of commercial nitrogen to provide adequate crop yields.”

- Some nutrient uptake values in the “One Plan Conservation Planner” program mistakenly defaulted to zero in the old NMP, and these values have been corrected in the June 30, 2006 nutrient management plan. Over application may have been due to a cropping budget (perhaps spread over several years) rather than an annual budget.
- When waste is exported, dairy operators are required to record the location, amount of product, and dates the product is exported. The Takasugi letter did not describe how the significant quantity of exported manure would be applied at agronomic rates.

At the end of his letter, Takasugi stated: “The modified NMP [June 30, 2006 nutrient management plan] complies with all state requirements.”

On December 8, 2006, Dreher sent a letter to the parties transmitting copies of the documents submitted with the November 22, 2006 Takasugi letter. Dreher’s December 8, 2006 letter gave the parties until January 8, 2007 to submit additional information regarding the Takasugi submittal.

On January 8, 2007, the Department received comments from the protestants. The comments reiterated previous concerns raised by the protestants but did not raise any significant new concerns based on the Takasugi submittal.

## **ANALYSIS**

### **Summary of Exceptions**

In the exceptions, the protestants quote finding of fact no. 26 of the *Preliminary Order and Default Order*:

Based on information presented by the protestants, the hearing officer believes there is a risk that, in the future, nitrate levels in the ground water in the vicinity of the Funk Dairy may exceed the maximum limit of 10 mg/l of water.

The protestants argue that finding of fact no. 26 “is clearly at odds with the Hearing Officer’s decision in his Order denying Protestants Petition for Reconsideration that ‘the applicant established its prima facie case that operation of a proposed dairy would not violate Idaho water quality standards. . .’.”

In addition, the protestants reiterate from the record and the preliminary order that the nutrient management plan for the dairy proposed by transfer no. 71692 identifies 24 fields (of a total of 32 fields) that are vulnerable to nitrate infiltration and contamination. The protestants further state:

The likelihood that water quality standards will be violated as a result of the waste management plan should have resulted in a finding that the transfer is not in the local public interest. While other agencies in Idaho may have primary jurisdiction over water quality issues (Idaho Department of Environmental Quality, ISDA, Health Department), during the transfer process it is the Idaho Department of Water Resources responsibility to determine if water quality regulations are likely to be violated.

Finally, the protestants argue the evidence establishes that approval of application for transfer no. 71692 “will present a health, & safety issue for the neighbors of this dairy.” Arguments include the following:

- The Funk dairy will be located in a priority 1 nitrate area that has third highest nitrate levels in the state.
- A large portion of the nitrate area overlaps critical ground water areas established by the Department.
- The direction of ground water flow containing nitrates from other confined feeding operations is toward the protestants’ wells. The Funk dairy will add more nitrates to the ground water.

### **Analysis of Exceptions**

The findings of fact in the *Preliminary Order and Default Order* recognized the increased possibility of nitrate contamination to ground water underlying 24 of the fields upon which Funks propose to apply water that have been designated “vulnerable” to nitrate contamination. The findings of fact also recognized that the Funk dairy will be located in an area of nitrate concern.

Nonetheless, the waste management plan proposes application rates to the land that will not increase nitrates in the ground water. Furthermore, the State of Idaho confined animal feeding operation (CAFO) Site Assessment Team gave the proposed Funk dairy site its best rating.

Increased risk of contamination does not equate to a determination that the proposed Funk dairy will or is likely to contaminate the ground water to unacceptable levels. The hearing officer concluded, based on the preponderance of the evidence, that the Funk dairy can operate without violating Idaho water quality standards if Funks adhere to the requirements of the waste management plan. The favorable rating by the CAFO Siting Team supports the hearing officer’s conclusion. The increased risk of contamination is cause to include the following conditions of approval:

Prior to the diversion and use of water under this approval, the right holder shall comply with applicable water quality standards of the Department of Environmental Quality.

Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.

The hearing officer's statement about the increased risk of contamination is not necessary for this decision and will be removed from this final order.

Proximity of the proposed Funk dairy to critical ground water areas designated by the Department is not relevant information because Funks do not propose moving the location of the point of diversion from the original point of diversion described by the rights sought to be transferred.

The direction of ground water flow was considered, but was subsumed into the determination that the proposal would not violate water quality standards.

After considering the evidence, the Director finds, concludes, and orders as follows:

### **FINDINGS OF FACT**

1. Application for Transfer no. 71692 proposes the transfer of portions of two water rights, presently described in the records of the IDWR as follows:

|                     |   |
|---------------------|---|
| Water Right no.     | 45-2399   |
| Source:             | Ground Water  |
| Priority Date       | November 14, 1951                                     |
| Purpose of Use:     | Irrigation  |
| Flow Rate:          | 1.6 cfs   |
| Point of Diversion: | T11S, R20E Section 1 SESESW <sup>1</sup>              |
| Place of Use:       | 149 acres located in the SW of Section 1, T11S, R20 E |

Irrigation under water right no. 45-2399 is limited to 80 acres.

|                     |   |
|---------------------|---|
| Water Right no.     | 45-2472   |
| Source:             | Ground Water  |
| Priority Date       | March 3, 1954   |
| Purpose of Use:     | Irrigation  |
| Flow Rate:          | 0.8 cfs   |
| Point of Diversion: | T11S, R20E Section 1 SESESW                           |
| Place of Use:       | 149 acres located in the SW of Section 1, T11S, R20 E |

Water right no. 45-2472 describes the entire 149 acres without a lesser acreage limitation for the right standing alone.

2. Sixteen of the 149 acres described as irrigated acres by water right nos. 45-2399 and 45-2472 are the place of use for water right no. 45-10069. Water right no. 45-10069 authorizes diversion of and irrigation with water diverted from "wastewater" tributary to the Milner Low Lift Main Canal. In addition, the application for transfer states there are also 40 shares of Milner Low Lift Irrigation District water that irrigates a

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<sup>1</sup> Public land survey descriptions in this decision without a fraction following a two alpha character descriptor are presumed to be followed by the fraction "1/4." In addition, all public land survey descriptions are presumed to be based on the Boise Meridian. All locations are in Cassia County.



portion of the lands. The application states that the surface water is used on the west side of the farm, and that the east side of the farm is where the dairy will be constructed. This application for transfer does not include water right no. 45-10069 or the Milner Low Lift Irrigation District Water.

3. Application for transfer no. 71692 proposes that portions of the water rights be changed as follows:

|                     |  |
|---------------------|--|
| Water Right no.     | 45-2399                                    |
| Source:             | Ground Water                               |
| Priority Date       | November 14, 1951                          |
| Purpose of Use:     | Stockwater and Commercial                  |
| Flow Rate:          | 0.6 cfs                                    |
| Point of Diversion: | T11S, R20E Section 1      SESW (two wells) |
| Place of Use:       | NESW and SESW of Section 1, T11S, R20E     |

|                     |  |
|---------------------|--|
| Water Right no.     | 45-2472                                    |
| Source:             | Ground Water                               |
| Priority Date       | March 3, 1954                              |
| Purpose of Use:     | Stockwater and Commercial                  |
| Flow Rate:          | 0.3 cfs                                    |
| Point of Diversion: | T11S, R20E Section 1      SESW (two wells) |
| Place of Use:       | NESW and SESW of Section 1, T11S, R20E     |

4. The application for transfer proposes to retire 55.8 acres of the 149 acres irrigated to supply water for the dairy. Water right nos. 45-2399 and 45-2472 are the only water rights identifying the 55.8 acres as a place of use.

5. Funks propose to construct and operate a dairy with 2,286 milking cows and another 1,000 heifers. Cassia County has approved a special use permit for construction and operation of a dairy with 6,200 cows.

6. Applicant's Exhibit no. 3 is a worksheet prepared by Charles G. Brockway ("Brockway"), expert witness for Funks. The worksheet contains calculations of water use for the proposed dairy. The computations follow accepted methods recognized by the Department for determining water use for dairy cattle. Applicant's Exhibit no. 3 concludes that 138 acre-feet of water must be provided for the proposed use.

7. The applicant attached historical water use information to the application for transfer for the five-year period preceding the filing of the application for transfer. The original application for transfer assumed only alfalfa had been grown on the acreage proposed to be retired. Correspondence in the file from Jim Stanton, a Department employee, to David Funk, dated March 29, 2005, stated that the historical crops grown included other less consumptive crops, and that 4.7 to 6.5 additional acres would have to be retired to match a historical crop consumption of 138 acre-feet. Jim Stanton determined 2.47 acre-feet per acre was the highest annual consumptive use for the mix of crops grown.

8. Brockway assumed an historical consumptive use of water of 2.47 acre-feet per acre in his calculations. Dividing the 138 acre-feet by 2.47 acre-feet per acre results in a total of 55.8 acres that must be retired from irrigation. The water that was once beneficially used for irrigation will be used for commercial and stockwater purposes.

9. The proposed dairy will be located on land presently irrigated solely with ground water from a well owned by Funk.

10. The amount of water that must be taken from each irrigation water right was determined by proportion. The 55.8 acres that must be retired is 37.45% of 149 acres. As a result, 37.45% of the flow rate authorized by each of the water rights must be transferred to the commercial and stockwater uses of the dairy. Applying the 37.45% to the 1.6 cfs authorized by water right no. 45-2399 results in a transfer flow rate of 0.6 cfs. Applying the 37.45% to the 0.8 cfs authorized by water right no. 45-2472 results in a transfer flow rate of 0.3 cfs. The total transfer flow rate is 0.9 cfs.

11. The flow rate authorized for irrigation by water right no. 45-2399 will be reduced from 1.6 cfs to 1.0 cfs, a reduction of 0.6 cfs. The percentage of reduction is 37.45%. The number of acres that can be irrigated solely by water right no. 45-2399 must also be reduced by 37.45%. When used alone, water right no. 45-2399 currently authorizes irrigation of 80 acres. Thirty acres is 37.45% of 80 acres. The number of acres that can be irrigated solely by water right no. 45-2399 after transfer approval should be limited to 50 acres.

12. The 149-acre place of use described by water right no. 45-2399 should be reduced by 55.8 acres.

13. Because water right no. 45-2472 describes 149 acres as a place of use, and does not describe a smaller place of use if the right is diverted and used independently, the entire place of use will be reduced by 55.8 acres.

14. The existing well is located approximately one-quarter mile away from the two new points of diversion proposed by the transfer.

15. The new points of diversion proposed by the application for transfer and the old point of diversion for irrigation are located within the same modeling cell of the Eastern Snake Plain Ground Water Model. As a result, there is no requirement for analysis of the proposed use using the Eastern Snake Plain Ground Water Model.

16. Brockway compiled information about existing wells near the proposed Funk Dairy and developed data for use in the Theis Equation. Using the data gathered, Brockway determined characteristics of the aquifer underlying the Funk property. Using the derived characteristics, Brockway determined drawdown impacts of the proposed new wells. The drawdowns at neighboring wells resulting from the Theis equation simulations are depicted in Applicant's Exhibit no. 2.

17. Brockway analyzed drawdowns by assuming the withdrawal of 138 acre-feet of ground water at a constant flow rate for an entire year. The proposed new points of diversion must be pumped at a rate of 0.19 cfs continuously for 365 days to accumulate 138 acre feet. The Theis simulation predicts that continuous pumping would result in a drawdown of 0.10-foot in the Skow well. The Skow well is located approximately 2,855 feet away from the proposed points of diversion, and is the nearest well to the proposed points of diversion owned by someone other than Funks. Drawdowns in other wells would be less than the drawdown in the Skow well.

18. Brockway also analyzed drawdowns by simulating pumping at the maximum rate of 0.9 cfs for 14 days. The simulation predicts that pumping at a maximum rate of 0.9 cfs for 14 days would result in a drawdown of 0.25-foot in the Skow well.

19. It is possible that the maximum rate of 0.9 cfs could be pumped for a period longer than 14 days. The hydrograph of the Skow well could be extrapolated into the future to estimate these drawdowns.

20. The Theis simulations by Brockway assume brand new points of diversion are being pumped. The transfer proposes replacing an existing irrigation well with two new points of diversion located within one-quarter mile of the existing irrigation well. The existing irrigation well has been pumping ground water in the past, and the effects of the irrigation well have already impacted the protestants' wells. Only in the non-irrigation season could the new points of diversion cause additional declines of water levels in the protestants' wells.

21. The hearing officer finds that the maximum drawdowns that could be caused by the proposed points of diversion will be less than half a foot. Drawdowns of one-half of a foot or less are not significant.

22. Funks submitted a nutrient management plan to the Idaho Department of Agriculture for approximately 4,200 head of cattle. The Idaho Department of Agriculture approved the nutrient management plan. The nutrient management plan satisfies the water quality compliance activities required by the State of Idaho.

23. In the nutrient management plan, approximately 50 fields owned by Funks were identified for application of liquid waste from the dairy. Of the approximately 50 fields, 21 were identified as vulnerable to infiltration and contamination. The nutrient management plan addresses these vulnerabilities by defining methods of waste application and nutrient management to minimize risk.

24. A State of Idaho Site Assessment Committee group visited the proposed Funk Dairy site, and determined that the site creates a low risk of contamination and conflict with other laws. This is the best rating the site assessment committee can give.

25. Ground water in the area of the proposed dairy has elevated nitrate concentrations. The location of the proposed dairy is within a "Nitrate Priority Area."

## CONCLUSIONS OF LAW

1. Idaho Code § 42-222 states, in pertinent part:

The director of the department of water resources shall examine all the evidence and available information and shall approve the change in whole, or in part, or upon conditions, provided no other water rights are injured thereby, the change does not constitute an enlargement in use of the original right, the change is consistent with the conservation of water resources within the state of Idaho and is in the local public interest as defined in section 42-202B, Idaho Code, the change will not adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates, and the new use is a beneficial use, which in the case of a municipal provider shall be satisfied if the water right is necessary to serve reasonably anticipated future needs as provided in this chapter. The director may consider consumptive use, as defined in section 42-202B, Idaho Code, as a factor in determining whether a proposed change would constitute an enlargement in use of the original water right. The director shall not approve a change in the nature of use from agricultural use where such change would significantly affect the agricultural base of the local area.

2. The applicant bears the burden of proof for all of the factors listed in Idaho Code § 42-222.

3. Approval and completion of the proposed transfer will not injure other water rights.

4. Approval and completion of the proposed transfer will not enlarge the use of the rights sought to be transferred provided:

- a. The flow rate for the residual irrigation portion of water right no. 45-2399 is limited to 1.0 cfs.

- b. The acreage solely irrigated by the residual irrigation portion of water right no. 45-2399 is limited to 50 acres.

- c. The total number of acres that can be irrigated by water right no. 45-2399 in combination with other rights is limited to 93.2 acres.

- d. The flow rate for the residual irrigation portion of water right no. 45-2472 is limited to 0.5 cfs.

- e. The total number of acres that can be irrigated by water right no. 45-2472 is limited to 93.2 acres.

5. The applicant received the best rating from the State Dairy Siting Committee and has complied with the nutrient management requirements of the Idaho Department of Agriculture. The applicant has received approval from Cassia County for its confined animal feeding operation.

6. The Idaho Department of Water Resources should not approve a water right that will violate water quality standards. Nonetheless, IDWR should defer to the agencies that have primary jurisdiction over water quality matters. This jurisdiction is vested in the Idaho Department of Environmental Quality, and has been delegated, in part, to the Idaho Department of Agriculture. The applicant has satisfied the local public interest test related to water quality as explained in the prior conclusion of law and in the findings of fact.

7. The changes proposed by application for transfer no. 71692 are in the local public interest.

8. The applicant will employ methods of water use that will conserve the water used in the dairy operation.

9. This application for transfer should be approved.

### **ORDER**

IT IS HEREBY ORDERED that application for transfer no. 71692 is **Approved** subject to the following conditions:

#### **WATER RIGHT NO. 45-13891 (remainder of 45-2399)**

This right is limited to the irrigation of 50.0 acres within the place of use described above in a single irrigation season.

Rights 45-13891 and 45-13893 when combined shall not exceed a total annual maximum diversion volume of 372.8 af at the field headgate, and the irrigation of 93.2 acres.

Use of this right with the rights listed below is limited to the irrigation of a combined total of 93.2 acres in a single irrigation season.

Combined Right Nos.: 45-10069 & 45-13893.

Right includes accomplished change in place of use pursuant to Section 42-1425, Idaho Code.

Pursuant to Section 42-1412(6), Idaho Code, this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as may be determined by the Snake River Basin Adjudication court at a point in time no later than the entry of the final unified decree.

**WATER RIGHT NO. 45-13892 (transferred part of 45-2399):**

Rights 45-13892 and 45-13894 when combined shall not exceed a total annual maximum diversion volume of 138.0 af.

Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code and applicable Well Construction Rules of the Department.

Prior to the diversion and use of water under Transfer approval 71692, the right holder shall install and maintain acceptable measuring devices, including data loggers, at the authorized points of diversion, in accordance with Department specifications.

The right holder shall record the quantity of water diverted and annually report diversions of water and/or other pertinent hydrologic and system information as required by Section 42-701, Idaho Code.

Prior to the diversion and use of water under this approval, the right holder shall comply with applicable county zoning and use ordinances.

Prior to the diversion and use of water under this approval, the right holder shall comply with applicable water quality standards of the Department of Environmental Quality.

Commercial use is for a dairy.

Pursuant to Section 42-1412(6), Idaho Code, this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as may be determined by the Snake River Basin Adjudication court at a point in time no later than the entry of the final unified decree.

The right holder shall accomplish the change authorized by this transfer within one year of the date of this approval.

Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.

**WATER RIGHT NO. 45-13893 (remainder of 45-2472):**

Rights 45-13891 and 45-13893 when combined shall not exceed a total annual maximum diversion volume of 372.8 af at the field headgate, and the irrigation of 93.2 acres.

Use of this right with the rights listed below is limited to the irrigation of a combined total of 93.2 acres in a single irrigation season.

Combined Right Nos.: 45-10069 & 45-13891.

Pursuant to Section 42-1412(6), Idaho Code, this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as may be determined by the Snake River Basin Adjudication court at a point in time no later than the entry of the final unified decree.

**WATER RIGHT NO. 45-13894 (transferred part of 45-2472):**

Rights 45-13892 and 45-13894 when combined shall not exceed a total annual maximum diversion volume of 138.0 af.

Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code and applicable Well Construction Rules of the Department.

Prior to the diversion and use of water under Transfer approval 71692, the right holder shall install and maintain acceptable measuring devices, including data loggers, at the authorized points of diversion, in accordance with Department specifications.

The right holder shall record the quantity of water diverted and annually report diversions of water and/or other pertinent hydrologic and system information as required by Section 42-701, Idaho Code.

Prior to the diversion and use of water under this approval, the right holder shall comply with applicable county zoning and use ordinances.

Prior to the diversion and use of water under this approval, the right holder shall comply with applicable water quality standards of the Department of Environmental Quality.

Commercial use is for a dairy.

Pursuant to Section 42-1412(6), Idaho Code, this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as may be determined by the Snake River Basin Adjudication court at a point in time no later than the entry of the final unified decree.

The right holder shall accomplish the change authorized by this transfer within one year of the date of this approval.

Failure of the right holder to comply with the conditions of this transfer is cause for the Director to rescind approval of the transfer.

**WATER RIGHT NO. 45-10069 (associated right):**

Use of this right with the rights listed below is limited to the irrigation of a combined total of 93.2 acres in a single irrigation season.

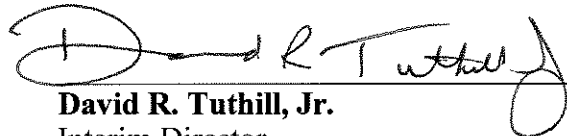
Combined Right Nos.: 45-10069, 45-13891, 45-13893.

This right remains subject to the right of the original appropriator, in good faith and in compliance with state laws governing changes in use and/or expansion of water rights, to cease wasting water, to change the place or manner of wasting it, or to recapture it.

Pursuant to Section 42-1412(6), Idaho Code, this water right is subject to such general provisions necessary for the definition of the rights or for the efficient administration of water rights as may be determined by the Snake River Basin Adjudication court at a point in time no later than the entry of the final unified decree.

Based upon failure to appear at the time and place set for hearing, IT IS FURTHER ORDERED that Marjorie Bradshaw, John Kloer, and Farnum and Irene Warr are dismissed as parties to the contested case.

Dated this 23<sup>rd</sup> day of February, 2007.

  
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**David R. Tuthill, Jr.**  
Interim Director



## CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 23<sup>rd</sup> day of February, 2007, a true and correct copy of the foregoing documents described below were served on the following by placing a copy of the same in the United States mail, postage prepaid and properly addressed to:

Document(s) Served: Final Order, and Explanatory Information Sheet to Accompany a Final Order when a hearing has been held.

DAVID L & SHIRLENE FUNK  
3040 N 3800 E  
HANSEN ID 83334

MARJORIE L BRADSHAW  
1300 W 323 S  
MURTAUGH ID 83344

ROBERT E WILLIAMS  
FREDERICKSEN WILLIAMS &  
MESERVY  
PO BOX 168  
JEROME ID 83338

JOHN KLOER  
3475 N 4900 E  
MURTAUGH ID 83344

FARNUM WARR  
1347 W 200 S  
MURTAUGH ID 83344

THOMAS C DRAPER  
3351 N 4900 E  
MURTAUGH ID 83344

KENNETH WARR  
1301 W 200 S  
MURTAUGH ID 83344

CHARLES G BROCKWAY P E  
BROCKWAY ENGINEERING  
2016 N WASHINGTON ST-STE 4  
TWIN FALLS ID 83301

KENNETH SKOW  
317 S 1400 W  
MURTAUGH ID 83344

ALLEN MERRITT  
IDWR – SOUTHERN REGION  
1341 FILLMORE ST STE 200  
TWIN FALLS ID 83301-3380



Victoria Wigle

Administrative Assistant to the Director